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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY AND MAYNARD A. LASWELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 220-241) is reported at 197 F. 2d 489. No opinion was rendered by the district court. The findings of fact and conclusions of law of that court are set forth at R. 37-48.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1952, (R. 242), and a petition for rehearing was denied on August 11, 1952 (R. 243).

The time for filing a petition for a writ of certiorari was extended to October 10, 1952, by Mr. Justice Clark on August 28, 1952. The petition for a writ of certiorari was filed on October 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the evidence supports a judgment convicting a manufacturer of carbon dioxide fire extinguishers and one of its officers of conspiring with the other principal manufacturers of such extinguishers and certain of their officers to fix and maintain uniform prices for their products in violation of Section 1 of the Sherman Act.

STATUTE INVOLVED

The pertinent provisions of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1) commonly known as the Sherman Act are as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000 * * *.

STATEMENT

On June 15, 1949, an indictment was returned against four corporate and three individual de-

fendants charging them with a conspiracy, in violation of Section 1 of the Sherman Act, to fix prices of portable carbon dioxide fire extinguishers in Southern California (R. 3-12).[1] Three of the corporate defendants[2] and two individual defendants entered *nolo contendere* pleas and were fined (R. 221). Defendant C-O-Two Fire Equipment Co. ("C-O-Two") and Maynard A. Laswell, its vice president in charge of sales—petitioners in this Court—waived a jury and proceeded to trial (*ibid.*). On February 26, 1951, judgments of guilty were entered as to both defendants by United States District Judge Ben Harrison in the Southern District of California (R. 34-37). C-O-Two was fined $5,000, and Laswell was fined $1,000 (*ibid*). At petitioners' request (R. 201-202), the court subsequently entered findings of fact and conclusions of law pursuant to Rule 23(c) of the Federal Rules of Criminal Procedure (R. 37-48).

The indictment charged that since January 1947 the defendants had engaged in a combination and conspiracy to fix and maintain non-competitive prices and terms and conditions relating to the sale of fire extinguishers manufactured by the corporate defendants to ultimate purchasers in Southern California (R. 7-8); that the corporate defendants

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[1] The term "fire extinguishers" is used in this brief to refer to portable carbon dioxide fire extinguishers.

[2] Walter Kidde & Company ("Kidde"), American-La France-Foamite Corporation ("La France"), and General Pacific Corporation ("Pacific") (R. 221).

In 1947 the four corporate defendants, together with General Detroit Corporation (Pacific's parent, Fdg. 4, R. 39), sold approximately 91% by dollar volume of all fire extinguishers sold in the United States (Fdg. 9, R. 41).

had agreed to publish and had published uniform prices at which fire extinguishers would be sold in that area (R. 8-9); that they had agreed to instruct and had instructed their dealers to follow such prices (*ibid.*); that they had policed their dealers to insure the latters' adherence to the published prices (R. 10); and that they had submitted, pursuant to agreement, identical bids for fire extinguishers to both the County and City of Los Angeles (R. 9-10).

The evidence showed—as the district court found—that from 1932 to the return date of the indictment the prices, terms and conditions of sale under which fire extinguishers manufactured by the corporate defendants were sold to ultimate purchasers in Southern California were "substantially identical" except for relatively short periods of time while price changes were being put into effect (Fdg. 18, R. 43; Ex. 8, R. Vol. II, 351), and that there was an "absence of price competition" among the corporate defendants in their sales in that area (Fdg. 28, R. 47).

In 1932 defendants Kidde, C-O-Two and La France were the only manufacturers of carbon dioxide fire extinguishers in the United States (R. 168, 185-186). In August of that year Kidde licensed C-O-Two and La France under its patents (Fdg. 11, R. 41).[3] Under the licenses, Kidde was empowered to and did fix maximum selling prices for its licensees (R. 171). During the ensuing ten

[3] Pacific and General Detroit were licensed under these patents in 1944. Fdg. 14, R. 42.

years, substantially the same prices were charged by C-O-Two, La France and Kidde (Fdg. 18, R. 43). The price-fixing provisions in the licenses were abrogated in August 1942 (R. 169-171; Ex. D, R. Vol. II, 369). For a brief period thereafter, there was some variation among the prices of the corporate defendants, but during the war prices were again identical, presumably as a result of government controls (Ex. 7, R. Vol. II, 344).

The substantial uniformity of prices continued after the war. Prices of all four manufacturers for their 10-pound extinguisher were identical[4] from June 15, 1946, to January 15, 1947 (Ex. 7, R. Vol. II, 344). On that date Kidde raised its price from $42 to $46 (*ibid.*). Identical price increases were made by C-O-Two on February 10, by La France on February 14, and by Pacific on February 15 (*ibid.*). The price of the 10-pound extinguisher remained at $46 until January 1, 1948, when C-O-Two raised its price to $48 (*ibid.*). Within the next two months, each of the other three manufacturers similarly increased its price to $48.00 (*ibid.*). From March 1, 1948—the date when La France brought its prices into conformity with those of the other three manufacturers—to the return date of the indictment, there have been no price variations among the four corporate defendants.

These identical prices were contained in suggested consumer price lists published by each of

[4] The 10-pound model has been selected as a typical illustrative example. Similarly identical prices were quoted by all four defendants on other sizes of extinguishers.

the corporate defendants (Ex. 1, R. Vol. II. 200-232). The same prices were charged to the ultimate consumer whether the fire extinguishers were sold directly by the defendant manufacturers or through their respective dealers (Fdg. 21, R. 43-44; R. 29-30). It was stipulated that each of 16 dealers would have testified that he followed the defendants' suggested consumer prices, that he knew the consumer prices of all the defendants during the period were identical, and that he understood that the defendant manufacturer whose product was being sold "required that such product be sold at the consumer prices published by said defendant" (R. 30).

In May and August, 1948, the corporate defendants or their dealers submitted identical bids for fire extinguishers to the County and City of Los Angeles, respectively (Fdg. 25, R. 45). In each of these instances a C-O-Two dealer submitted a bid containing more advantageous terms than those in the published list prices. Representatives of C-O-Two thereupon policed the non-conforming dealers "for the purpose of compelling said dealers, under threat of refusal to furnish fire extinguishers, to withdraw their bids." As a result of such policing both dealers attempted to withdraw their bids. (Fdg. 26, R. 45-46.)[5]

In one case, bids of $20.50 for 68 extinguishers were submitted by C-O-Two, Kidde and General

[5] In March, 1949, another group of identical bids of $61 were submitted to the City by each of the four corporate defendants (R. 95-96).

Pacific to Los Angeles County (R. 82-83).[6] A C-O-Two dealer, however, offered a 1% discount for cash 10 days (R. 83). After this bid had been submitted, the dealer received a telephone call from a C-O-Two representative in Los Angeles who told him that he had obtained a bid but that "you are the only firm that stepped out of line" since "every other bidder had the same identical price, except you" (R. 132). The C-O-Two representative suggested to the dealer that the bid be withdrawn (R. 138), and as a result the dealer wrote a letter to the county attempting to withdraw its bid because "the material is unobtainable by us at this time" (R. 84).[7]

In the other case identical bids of $61 (for a different size extinguisher) were submitted to the City (R. 92-93). A C-O-Two dealer quoted cash discount 2% thirty days, and was awarded the bid (R. 93). The dealer then received a telephone call from a Mr. Rives, a C-O-Two warehouseman in Los Angeles (R. 167), "asking that we withdraw our bid, and substantially stating we would not be furnished the extinguishers" (R. 114). The dealer sought to withdraw the bid, stating that the "quotation was made in error" (Ex. 1, R. Vol. II, 302), but the City refused to allow him to do so (R. 94). After considerable delay and correspondence (R. 115-120) the dealer finally obtained the extin-

[6] La France submitted a higher bid of $23.10 (R. 83), but this was due to a clerical error (R. 89-90; Ex. 1, R. Vol. II, 307-308).

[7] The County subsequently cancelled the bid (R. 85).

guishers from C-O-Two and made delivery (R. 114, 121).

In addition to identity of price among the four corporate defendants, there was also substantial identity as to terms and conditions of sale. Thus all defendants quoted on a delivered price basis only. Under their pricing system, a Los Angeles purchaser of a fire extinguisher paid the same price whether he bought from Pacific, whose factory was in Los Angeles (R. 31), or from one of the other three defendants whose plants were in New Jersey or New York (*ibid.*) Moreover, all the defendants followed the same quantity discount system, both as to amount of discount and bracket quantities (Ex, 1, R. Vol. II, 200-230).

The extinguishers manufactured by the four defendants were "substantially identical" as to size, color and other physical characteristics, and the models of the different manufacturers were "so standardized that they are generally distinguishable only by the manufacturers' labels contained thereon" (Fdg. 6, R. 39-40; R. 65, 174).

During the period of the conspiracy the corporate defendants were all members of the Fire Extinguisher Manufacturers' Association, Inc., a trade association (R. 17). Petitioner Laswell was a member of and represented C-O-Two on the Carbon Dioxide Committee of the Association (R. 17-18). During the period of the conspiracy at least nine meetings of that committee were held (R. 19-23), at which "an opportunity was * * *

afforded to discuss and agree upon prices and pricing policies on an industry-wide basis * * *" (R. 228). Laswell "instigated, determined, and supervised" C-O-Two's prices and sales policy during this period (Fdg. 27, R. 46; R. 192).

On the basis of the foregoing and other evidence, the trial court found that from May 1947 to the return date of the indictment, all of the defendants were parties to a combination and conspiracy to fix, determine, establish and maintain non-competitive prices, terms and conditions relating to the sale of fire extinguishers to ultimate purchasers in Southern California (Fdg. 17, R. 42; Conclusion of Law, 1, R. 47).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the judgments of conviction (R. 242). The court wrote a lengthy opinion (R. 220-241) in which it carefully reviewed the evidence and concluded that the facts were "inconsistent with any other reasonable hypothesis" than "the guilt of appellants" (R. 241). The court pointed out that in addition to the "admitted price uniformity"—for which the defendants had "not come forward with any satisfactory explanation" (R. 237)—there were a number of other "plus factors" supporting the district court's finding of conspiracy (R. 240). These included (1) a background of "illegal licensing agreements" containing minimum price maintenance provisions, (2) an "artificial standardization" of products, (3) a raising of prices at a time when a surplus existed

in the industry,[8] (4) a policing of dealers to maintain the minimum price provisions in the published price lists, (5) the use of a delivered price system which resulted in identical customer prices no matter where the product was manufactured, and (6) the submission of identical bids to public agencies (R. 240-241).

A petition for rehearing was denied by a divided court (R. 243).[9]

ARGUMENT

1. Petitioners concede that the "sole question involved" in this case is "whether the circumstances proved are sufficient to support a finding of conspiracy in a criminal prosecution under section 1 of the Sherman Act" (Pet. 5). Contrary to petitioners' contention, however, this presents no important general legal issues, but solely the narrow question of the sufficiency of the evidence supporting the judgments of conviction. The trial court, which observed the witnesses, found that the material allegations of the indictment "have been proven beyond a reasonable doubt"

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[8] During the war "most" of C-O-Two's sales were made directly to the Government (R. 175). At the end of the war, the Government "dumped tremendous quantities of our extinguishers on the market as surplus" (R. 176). Despite this surplus, all the defendants raised their prices shortly after the end of the war (*ibid.*). The president of C-O-Two, in describing this situation, stated: "* * * we had to get our prices up and I know what applied to us applied to other manufacturers as well. * * * [the surplus] couldn't [prevent prices from rising]. We had to put them up" (*ibid.*).

[9] Judge Pope, dissenting from the denial of rehearing, stated that he thought there was a "grave question" of the sufficiency of the evidence "to prove guilt beyond a reasonable doubt" (R. 244-245).

(R. 200), and the court of appeals in a lengthy opinion carefully reviewed the evidence and concluded that the "facts are * * * inconsistent with any other reasonable hypothesis" than "the guilt of appellants" (R. 241). This conclusion, concurred in by both courts below is plainly correct, and there is no reason for further review by this Court.

Petitioners analyze separately the principal factors relied on by the court of appeals in an endeavor to show that each factor *of itself* was insufficient to establish the existence of the conspiracy.[10] It is well settled, however—as petitioners concede (Pet. 12)—that the "character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States* v. *Patten,* 226 U. S. 525, 544. We submit that the evidence when viewed in its entirety fully supports petitioners' conviction of a price-fixing conspiracy in violation of the Sherman Act.

Admittedly, the evidence of such conspiracy is circumstantial. But "conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done." *Eastern States Retail Lumber Dealers' Association* v. *United States,* 234 U. S. 600, 612. In Sherman

[10] Thus, in discussing the evidence relating to the identical appearance of the products manufactured by the four corporate defendants, petitioners state (Pet. 26): "This fact [identity of appearance], and this fact alone, was held by the court below to establish a *prima facie* case of *a price-fixing conspiracy* in a criminal case * * *" (Italics in original). And see *infra,* p. 15.

Act cases the Government ordinarily "is without the aid of direct testimony" relating to the agreement, and "to establish agreement it is compelled to rely on the inferences drawn from the course of conduct of the alleged conspirators." *Interstate Circuit* v. *United States,* 306 U. S. 208, 221. And "[i]t is not necessary to find an express agreement in order to find a conspiracy." *United States* v. *Paramount Pictures,* 334 U. S. 131, 142.

Defendants' pricing practices during the period 1947-1949 took place against a background of 10 years of admitted price fixing pursuant to patent licensing agreements, during the last 4½ of which, as petitioners put it, "there was not one hour of one day during which the price of a single manufacturer for a single model varied by a fraction of a cent * * *" (Pet. 14). At the end of the war "we [C-O-Two] had to get our prices up and I know what applied to us applied to other manufacturers as well" (R. 176). Accordingly, despite a surplus of "tremendous quantities of our extinguishers" that had been dumped on the market by the Government (*ibid.*), the corporate defendants put into effect identical price increases in January and February of 1946 (Ex. 7, R. Vol. II, 344; R. 179). Thereafter, except for three brief intervals while price increases were being put into effect (*ibid.*), all the corporate defendants maintained identical prices for their products.

These identical prices were charged whether the customer in California bought directly from the manufacturer or from one of its dealers, or

whether the extinguisher was manufactured in California, New York or New Jersey. Cf. *Milk and Ice Cream Can Institute* v. *Federal Trade Commission,* 152 F. 2d 478, 481 (C. A. 7). In addition, identical bids were submitted by all the corporate defendants or their representatives to public agencies, and on at least two occasions dealers who offered terms more favorable than those in the published list prices were policed to correct their deviations. Finally, the products manufactured by each manufacturer were so similar in appearance that their source could be determined only by examining the label.[11]

Petitioners offered no explanation—although the district court repeatedly sought one (R. 174, 175, 179, 192-193)—as to why the defendants all charged the same price, no matter where the product was made, or why a price increase by one was quickly followed by identical increases by all the others. They did not show that the raw material prices or manufacturing and operating costs of all defendants were the same. Cf. *Pevely Dairy Co.* v. *United States,* 178 F. 2d 363, 367-368 (C. A.

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[11] It does not appear that fire extinguishers are simple tools like "shovels, hoes, rakes or paint brushes" (R. 245). On the contrary, they are complex pieces of industrial machinery (Ex. 1, R. Vol. II, 195-198) and one would suppose that in a truly competitive industry manufacturers would endeavor to make their respective products sufficiently distinctive to be easily recognizable and to afford a basis for competitive claims of superiority in characteristics and design. Products such as tank-type vacuum cleaners, for instance, are made sufficiently distinguishable to permit ready identification by the buying public. The identity of the defendants' products, on the other hand, facilitated maintaining identical prices.

8), certiorari denied, 339 U. S. 942. They offered no evidence to explain the joint increases in price, or to show that higher costs, which might have been responsible for the increase by one manufacturer, were identically applicable to all the others.

The foregoing circumstances, coupled with the background of price fixing pursuant to the patent licensing agreements and the defendants' opportunity to discuss and agree upon industry-wide pricing practices at the frequent meetings of their trade association, are clearly sufficient to establish that the defendants "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful [price-fixing] arrangement * * *." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 810. Petitioners' contention that the evidence disclosed no more than "a normal business practice characteristic of a competitive market" (Pet. 32-33) simply does not stand up in the light of the evidence in the record.

2. The decision below is not in conflict with decisions of this Court or those in other circuits. The alleged conflicts reflect petitioners' erroneous view that the sufficiency of the evidence must be determined in the light of whether each factor of itself is sufficient to show conspiracy, rather than by viewing the evidence as a whole (see *supra,* p. 11).

Petitioners allege that the court of appeals' reliance on the fact that defendants charged identical prices for their products no matter where sold

is in conflict with *Federal Trade Commission* v. *Staley Co.*, 324 U.S. 746 (Pet. 20-23). The issue in the *Staley* case was whether, in a proceeding brought by the Federal Trade Commission under Section 2(a) of the Clayton Act, respondents had sustained their burden of justifying their basing point pricing system by "showing that their prices were made 'in good faith' to meet a competitor's equally low price" (p. 748). There was no charge or finding of conspiracy, or question as to evidentiary support for such a finding, and the case has no relevancy here. Petitioners, in attempting to frame a conflict with the *Staley* case, state that the court of appeals in the instant case "holds that the Government establishes a *prima facie* case of criminal conspiracy by showing, without more, that each of a number of competitors charges it customers the same delivered price throughout the country" (Pet. 22). The opinion of the Court of Appeals makes clear, however, that the court treated this as merely one of a number of "plus factors" (R. 240) which constituted "[a] dditional circumstantial evidence of the existence of a conspiracy * * * " (R. 237).

Similarly without substance is the asserted conflict between the decision below and the cases cited on page 25 of the petition. Contrary to petitioners' contention (Pet. 25), the court below did not treat "mere membership" in a trade association as evidence of crime. The court referred to the trade association committee meetings to show that the defendants had "an opportunity" to "discuss and

agree upon prices and pricing policies on an industry-wide basis * * * " (R. 228). Nor does the decision below conflict with the cases cited on page 31 of the petition. The court below did not hold that it was illegal for the defendants to suggest retail prices to their dealers. It merely concluded that such suggested prices—coupled with the stipulation that the dealers "understood that the defendant manufacturer whose product was being sold *required*" that such prices be followed (R. 30, italics supplied) and the fact that dealers who failed to follow the "suggested" prices were policed—was another link in the evidentiary chain of conspiracy.

CONCLUSION

The decision below is correct, no important question of Federal law is presented, and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1952.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY and MAYNARD A. LASWELL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

REPLY BRIEF FOR PETITIONERS.

In its effort to support the decision of the court below the Government has been unable to find one word of testimony—one fact in the record—to add to the facts referred to and discussed by us in the petition for a writ of certiorari. Its brief in opposition merely serves, we submit, to emphasize the validity of each point made in the petition.

The sum of the Government's argument is at pages 12 to 13 of its brief. It is there compelled to argue, on the facts of this record, that the following evidence is sufficient to support the finding that defendants, in this *criminal* case, are guilty of an industry-wide price-fixing conspiracy:

(1) The fact that from 1932 to 1942 defendants operated under patent license agreements fixing sale prices for the patented products—notwithstanding that these price-fixing provisions (entered into more than 20 years ago under the sanction of the then recent *General Electric* decision) were repudiated in word and in action in 1942, years before the commencement of the alleged conspiracy in this case (Petition, pp. 13-15; Price Chart, Appendix to Petition).

(2) The fact that defendants increased their prices after the War at a time when the Government was dumping surplus extinguishers on the market—notwithstanding that virtually all of defendants' products were sold to the Government during the War at the lowest prices in the industry's history and that the post-war price increases occurred normally at times of sharply rising costs, and notwithstanding that the surplus extinguishers (which manifestly are non-competitive with new products) were dumped by the Government at prices below petitioners' post-war costs of production (Petition, pp. 17-19).

(3) The fact that, except for "brief intervals" during price moves, the defendants charged the same prices for their products, including prices quoted on three invitations to bid by public bodies—notwithstanding that these

so-called "brief intervals" varied from two weeks to three and one half months,[1] and notwithstanding that the invitations for bids—and there were only three during the years covered by the indictment—were for relatively small quantities of extinguishers, within defendants' published quantity discounts, and the bids were at defendants' published list prices (Petition, pp. 15-17).[2]

(4) The fact that each of the defendants followed the practice of selling its products throughout the country at a single delivered price—notwithstanding that this is a common practice of thousands of American businessmen (Petition, p. 22).

(5) The fact that the products manufactured by each defendant are similar in appearance—notwithstanding that extinguishers are industrial implements, functional in character and design; that there is not a line in the record to show artificial standardization; that the record affirmatively shows competition and independent action in the manufacture and sale of various types of extinguishers (Petition, pp. 26-30; Model Chart, Appendix to Petition).

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[1]These so-called "brief intervals" show diversity of prices, not during hours or days (although even if such short intervals obtained this alone would not show conspiracy—see authorities cited, Petition, p. 16), but during *seven months* of the three and one-half year period from late 1945 to the date of the indictment (Price Chart, Appendix to Petition).

[2]As we point out in the petition (pp. 10, 31-32), the fact that C-O-Two admonished two of its dealers in connection with these bids has *no* bearing on the industry-wide *horizontal* price-fixing conspiracy charged in the indictment. The Government makes no showing to the contrary.

No authority is cited by the Government to support this argument. As far as our research discloses, no authority which could support it exists. Authorities do exist which illustrate the type of showing which has been held sufficient to support a finding of conspiracy: the type of showing made by the Government in other cases involving contentions similar to those made in the case at bar. We summarize a number of these cases (which were relied on by the Government in the court below) in the appendix to this brief. Nothing, we believe, could more clearly demonstrate the total failure of the Government to prove a case here.

The Government's attempt (Brief in Opposition, pp. 14-16) to distinguish the conflicts of decisions pointed out in our petition simply glosses over the actual rulings of the court below and their impact as precedents. Respectfully we urge that our analysis of the decision is correct.

CONCLUSION.

We submit that the judgment in this case is indefensible; that the decision of the Court of Appeals is erroneous and in conflict with the cases cited in the petition; that the decision, unless reversed, will constitute a precedent which will characterize as criminal the normal activities of numerous American businessmen, and which will condone and encourage a slipshod and capricious enforcement of the antitrust laws.

We respectfully submit that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
November 13, 1952.

Respectfully submitted,

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(Appendix Follows.)

Appendix

(See p. 4 of this brief.)

The following reviews do not purport to summarize all of the evidence or the issues in each of these complicated cases. They are sufficient, we submit, to emphasize the complete lack of support for the judgment in the case at bar.

United States Maltsters Ass'n v. Federal Trade Com'n (7 Cir. 1945) 152 F.2d 161.

Court of Appeals	Federal Trade Commission 35 F.T.C. 797
1. Basing Point.	
The members at all times quoted and sold malt f.o.b. Chicago plus freight. Freight was calculated from Chicago irrespective of the fact that the plants of the various respondents were located in four different states.	Respondents at all times quoted and sold malt f.o.b. point of delivery. The freight factor was computed on an f.o.b. Chicago basis and in reporting sales to the Association, each member quoted the prices as f.o.b. Chicago (p. 808). At a meeting of the Association held August 5, 1930, it was resolved that a freight rate to all points not previously listed in the freight rate schedule be added thereto (p. 807). At a meeting of the Association held September 11, 1930, the members by resolution agreed to quote only delivered prices or f.o.b. final destination (p. 807).

2. Reports.

The Association received daily reports from the respondents showing the dates of sales, destinations of shipment, grades and quantity of malt sold and the price received f.o.b. Chicago. Similar detailed reports were made weekly and monthly.

The Association had during its entire existence collected and disseminated among the respondents information as to prices, terms and conditions of sale (p. 806).

3. Price Changes.

When a respondent intended to offer malt for a price different from the prevailing posted price, such fact was communicated to the Association, usually by wire, and the information was relayed on to all members, usually by wire.

The court stated (p. 164): "When a member announced an increase in price, that information was flashed by telegram to every other member and they immediately announced a like increase. When a member announced a decrease in price, such announcement was likewise flashed to all other members and they at once proceeded to announce a similar decrease."

At a meeting of the Association on January 10, 1934, it was agreed that each member should send 25 copies of its price list to the Association for distribution to the various members, a practice generally followed until 1940 (p. 808).

Whenever any respondent offered, or proposed to offer, malt at a price other than the price it had theretofore quoted, the member wired or telephoned the Association and advised it of the price "f.o.b. Chicago basis" and the effective date. Immediately thereafter the other members of the Association were advised by wire or telephone (p. 809).

Immediately upon receipt of notification of a change in price, all the other respondent members uniformly adopted such price and immediately notified their customers of the change (p. 810).

Court of Appeals	Federal Trade Commission 35 F.T.C. 797

4. Discounts.

Court of Appeals	Federal Trade Commission
In February, 1938, one of the respondents discussed with the executive committee of the Association the advisability of allowing a cash discount. Up to this time no discount had been offered. Thereafter, this respondent published a cash discount of ½¢ a bushel and all other members immediately commenced quoting an identical discount.	At a meeting of the Association on February 10, 1938, it was resolved that a uniform cash discount should be allowed and it was thereafter given by all (p. 808).

5. Price Uniformity.

Court of Appeals	Federal Trade Commission
	After the organization of the Association the prices of all respondents were at all times identical and uniform for the various grades of malt sold and there was at no time any deviation from prices reported to the Association by any respondent member (pp. 808-809).

6. Policing.

Court of Appeals	Federal Trade Commission
	In order to determine that the respondents were selling malt at the prices reported to the Association, the books of each were checked from time to time by a firm of accountants retained by the Association. Both books and invoices were checked (p. 810).

7. Standardization of Product.

At a meeting of the Association on September 11, 1930, the members adopted grading standards to apply to all sales of malt (p. 807). Again, at a meeting on October 31, 1930, the members resolved to adopt the grading specifications recommended by the Executive Committee of the Association in instances where a "guaranty" of specifications was required (p. 807).

8. Eliminating Competition of Others.

At a meeting of the Association on June 29, 1933, the respondents resolved not to sell to purchasers unless such purchasers agreed not to resell the malt. This practice was thereafter followed by the members (p. 807).

At a meeting of the Association on December 15, 1933, the members resolved not to permit sales agents handling respondents' malt to sell imported malt (p. 808).

Fort Howard Paper Co. v. Federal Trade Com'n (7 Cir. 1946) 156 F.2d 899, cert. den. (1946) 329 U.S. 795.

Court of Appeals	Federal Trade Commission 38 F.T.C. 282

1. Zone Pricing.

The zones adopted by the respondents were originally marked out and distributed by the Association under the NRA. The "artificiality and arbitrariness of the zone structure" was so apparent that it "could not withstand the inference of agreement" (p. 907). For example, zone 1 was obviously drawn to include all manufacturers and therefore put them on an equal basis. The companies were located from Wisconsin to the eastern seaboard (p. 906).

In a meeting on August 17, 1933, under NRA it was agreed that the three-zone system should be adopted (p. 289). Then, in a meeting on June 11, 1935, shortly after the decision in the *Schechter* case, the members agreed that they should continue to operate ". . . under the same conditions as were in force prior to the elimination of NRA" (p. 290).

2. Reports to the Association.

Documentary evidence before the Commission disclosed that the Commission was used as a price exchange bureau (p. 907).

At a meeting held on May 17, 1938, it was resolved that copies of orders and invoices should be promptly furnished the Association, and that each member should telephone or wire the Association simultaneously with a change in a published list price (pp. 291-292).

3. Classification of Buyers.

In a meeting on January 17, 1936, it was stated by motion duly passed that a buyer in order to come within the Class 1 classification must conform to certain standards. The list of Class 1 buyers was to be reviewed on January 1 and July 1 of each year (p. 291).

At a meeting on June 2 and 3, 1936, a new form of price structure was adopted eliminating buyer classes 1, 2 and 3 as well as reducing the number of quantity brackets (p. 291).

Finally, at a meeting on May 2 and 3, 1939, the Statistical Bureau of the Association was directed to compile a list of "A" buyers whose purchases averaged over 100 gross a month for a six months' period and a list of "B" buyers whose purchases averaged from 25 to 99 gross over a six months' period (p. 292).

4. Standardization of Product.

At a meeting on November 10, 1936, the executive secretary urged and the manufacturers agreed that the products be standardized as to creping. He stated that excessive ratios had had as bad an effect on the market as a violation of each manufacturer's own published

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	price lists and that the stability of the market would surely be wrecked if steps to correct the situation were not "vigorously continued" (p. 291).
	5. Prices and Price Changes.
	At a meeting on June 23-24, 1937, it was decided that when a customer asked that paper be cut, jobbers' prices should be quoted (p. 291).
	Price changes were telephoned or telegraphed to the Association which, in turn, notified all members by telephone or telegraph (p. 291).

Milk and Ice Cream Can Institute v. Federal Trade Com'n (7 Cir. 1946) 152 F.2d 478.

Court of Appeals	Federal Trade Commission 37 F.T.C. 419
	1. The Freight Equalization Plan.
The nature of the freight equalization plan as explained in the Commission's findings, was such that the court stated (p. 482):	Under this plan the purchaser normally paid the freight from the shipper's plant to destination and the shipper then credited the purchaser's invoice for the difference between the freight paid and the freight from the location of the competitor located nearest to such purchaser (p. 431).
"• • • it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves."	
In addition, the petitioners admitted the plan was used for the express purpose of effecting	

uniform delivered prices. The court went on to say that any doubt on the question of agreement was removed by reference to the minutes of the Institute and other evidence found in the record.

2. Freight Rate Books.

Freight rate books (Climax) were procured by the Institute and issued to the members. The court stated that because of the manner in which the rate books were used, as disclosed in the record, they constituted an integral part of the price fixing combination.

At various meetings Hunter (Secretary of the Institute) suggested and discussed with the respondent members the use of some freight reporting service because of certain errors that were being made by various companies. After approval at an Institute meeting a contract was entered into with Climax Traffic Bureau to prepare and deliver 350 freight rate books to the Institute for distribution to the members. The evidence showed that these books were used simply for quotation of price and that in making actual shipments and determining routes the various respondent companies referred to other traffic information and route books (pp. 432-433).

3. Reports.

Each respondent reported daily to the Institute which had one man, Hunter, who checked continually on deviations in price and called such devia-

At a meeting of the Institute it was discussed and agreed that all members should report at the close of each business day all orders received that

tions to the attention of the appropriate respondent. This reporting system was adopted by the respondents at Institute meetings after general discussions.

day, all contracts entered into that day and all releases made that day against contracts previously reported. The daily reports for metal milk cans showed date of each order, customer's name, address and business, quantity, description, covers, extras, deductions, unit price, discounts, terms and destination, and in addition the freight charged and equalized (p. 430).

4. Buyer Classification.

The Institute established a classification of buyers with a determined discount allowable to each class.

Hunter at a meeting of the Institute submitted definitions of jobbers and dealers and detailed the circumstances under which a customer might come within one of the classifications. These classifications were adopted by the respondents at this meeting. In addition, the members adopted a list of so-called "5-car or more buyers" and discounts to be allowed such buyers. From time to time respondent members made additions to and deletions from this list (although the list was discontinued in 1932) (p. 435).

5. Standardization of Product.

The record showed "a continuing effort and urging" on the part of the Institute and its members to have the cans

The Commission found that the respondents by agreement eliminated models and styles of cans, changed the design

manufactured in uniform classifications. The court said (p. 482):

"The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement."

and otherwise standardized the product independent of and beyond any requirements for standardization prescribed by federal or state law. As an example of such agreement it was pointed out that the evidence showed that uniform gages and weights for milk cans had been worked out after a series of discussions. All respondents were asked to report on which styles and sizes of cans should be manufactured and which ones eliminated. After these reports were in, a committee made a report to a meeting of the Institute members stating the recommendations. These recommendations were adopted by vote. Thereafter from time to time various recommendations were made by the committee to the members at meetings. At a meeting on January 23, 1940, Hunter (secretary of the Institute) pointed out that all members when making improvements or developing some new construction in their equipment should either furnish a sketch of the item or a sample to other respondent members.

6. "Seconds."

The Institute through Hunter established rigid rules for the classification and distribution

A complete investigation was had into the extent to which "firsts" were being sold as

Court of Appeals	Federal Trade Commission 38 F.T.C. 419
of "seconds." The record revealed that in some instances some of the respondents had sold "firsts" as "seconds" for the purpose of making an indirect price concession. In these instances the respondent was policed by Hunter.	"seconds" as a hidden discount. Hunter recommended, and the respondents concurred, that the minimum discount on seconds should be increased to make it unprofitable to continue this particular type of price-cutting practice (pp. 435-436).

Triangle Conduit & Cable Co. v. Federal Trade Commission (7 Cir. 1948) 168 F.2d 175, aff'd per curiam (1949) 336 U.S. 956.

Court of Appeals	Federal Trade Commission 38 F.T.C. 534
1. Basing Point Pricing.	
The evidence showed that the respondents for many years had been discussing among themselves the basing point pricing system. From time to time as a result of such discussions, the system had been changed in detail, but on the whole had a continuous existence. The system involved a formula consisting of a base price at either Pittsburgh or Chicago, plus rail freight to every destination in the United States. In order to prevent errors in determining railroad tariff rates, the respondents, acting through the Association, employed one Donley to prepare a schedule, from which it	The Commission summarized (p. 560) the history of basing point pricing in the industry and pointed out that under the formula the price difference between Pittsburgh and any destination was not equal to the freight rate between Pittsburgh and that point. That the various modifications in the basing point system were undertaken pursuant to agreement was documented by the Commission (pp. 560-570). For example, in a letter dated November 20, 1939, written by a representative of one of the respondents, it was stated that the question of whether or not Chicago should be dropped as a base

Court of Appeals	Federal Trade Commission 38 F.T.C. 534
was simple to compute rates to any destination in the United States from either Chicago or Pittsburgh.	was discussed at an Association meeting. The letter contains these words: "Please note this memorandum and destroy" (p. 562).

2. Price Uniformity and Price Change.

In one instance respondents matched their bids to the fourth decimal point on one million feet of conduit for delivery to the United States Navy Department. Other instances of other identical bids were in the record.

Commencing in 1930, respondents adopted a card system of quoting prices. Beginning with card No. 1, all price cards issued by each of the respondents bore numbers identical with those of the corresponding cards of the other respondents, and the cards of all respondents of any given number were identical in all material particulars. (p. 561).

After a complete study by the Association, the respondents adopted, after a joint meeting with jobbers, discounts to be allowed for quantity purchases by wholesalers. The respondents' price cards were simultaneously changed immediately thereafter to reflect these discounts (pp. 577-578).

The evidence showed that the respondents discussed and agreed on what purchasers should be considered wholesalers and entitled to the uniform trade discount (pp. 581-583).

Court of Appeals	Federal Trade Commission 38 F.T.C. 554

3. Policing Activities.

The Association was used to investigate instances of price cutting by its members. Specific examples of extensive policing activities are detailed at pages 578-579.

Eugene Dietzgen Co. v. Federal Trade Com'n (7 Cir. 1944) 142 F.2d 321, cert. den. (1944) 323 U.S. 730.

Court of Appeals	Federal Trade Commission 33 F.T.C. 1130

1. Reports to and from the Association.

Aside from the price lists which are covered under point No. 2 below, the court made no mention of any particular reports which were submitted to or issued by the Association.

The Association collected from and disseminated among the respondents information as to prices, discounts, and terms and conditions of sale. In addition the members filed with the Association schedules of effective prices, including discounts and conditions (p. 1138).

2. Price Uniformity and Price Changes.

Prior to July 10, 1932, the price structure in the industry was completely demoralized. On that date the representatives of several manufacturers met and agreed on a price list to become effective July 10. The prices were considerably higher than those prevailing in the industry. At a meeting late in October, 1935, after the N.R.A. had

At a meeting in June or July of 1932, representatives of the respondents agreed that they would adhere strictly to the price discounts, terms and conditions of sale shown on an approved price list circulated among them at that time. Thereafter, during the next five or six months, other members of the industry joined and

been declared unconstitutional, the members resolved to continue to abide by the code of ethics and stipulated that it was unfair to sell for less than the lowest published price of any member. The same resolution was adopted at a meeting on June 1, 1936 (p. 324).

No rational or satisfactory explanation was made of the evidence showing that the respondents repeatedly made identical bids ranging from $3,000 to $35,000 (p. 327).

followed the prices previously adopted (p. 1143).

At a meeting on June 3, 1935, after N.R.A., the members, by unanimous vote, agreed to continue in force all provisions of the Code with the proviso that the section relating to price fixing should be reworded in a "legally acceptable form" (p. 1144).

At another meeting in October 29, 1935, rules of fair competition were adopted by unanimous vote. These rules provided in part that it would be an unfair practice to "Sell, or offer to sell, products on which price information has been filed and published, at less than the lowest net price filed and published by any member on such product or products; [or] sell, or offer to sell, special products which are covered by his filed and published price lists at net prices more favorable to the purchaser than the lowest filed and published net prices for a similar item of comparable grade" (p. 1145). It was also declared unfair to offer terms more favorable than 2/10 net 30, or to take contracts for a period of more than one year (p. 1145). At another meeting on June 1, 1936, the above provisions with slight amendments were again adopted by unanimous vote (p. 1145).

Court of Appeals	Federal Trade Commission 33 F.T.C. 1130
	Before the meeting in 1932 identical bids were the exception. After the meeting and adoption of the approved price list variation in any bid by a single member of the Association became the exception (pp. 1146-1147). The Commission detailed a number of identical bids made by the respondents during 1936 and 1937 (pp. 1146-1149).
3. Policing Activities.	
The evidence showed that at least on one occasion a respondent wrote to the Association complaining of another member who was cutting prices by varying the agreed-upon standards. In this letter the Association was requested to ask the wayward member for a full explanation of his actions.	The Association was active in the attempt to have its members observe the agreed upon rules and practices with respect to terms and conditions of sale (p. 1146).
4. Eliminating Competition of Others.	
	The Commission found that in some instances where some member of the industry would bid at prices less than those fixed by the respondents, the latter would collusively submit identical bids at prices lower than those that would otherwise be submitted so as to prevent the nonparticipating member from securing any substantial amount of business and to compel such member to become a party to the industry agreement (p. 1138).